82-1487

No.

IN THE

Supreme Court of the United States

Spring Term 1983

ROBERT P. HERZOG, RECEIVER OF
D. H. OVERMYER CO., INC. (OHIO) *ET AL., Petitioner*

v.

THE FIRST NATIONAL BANK OF BOSTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it an abuse of discretion for a district court to dismiss a complaint involving 200 million dollars because of plaintiff's partial failure to comply with a court order to attend a settlement conference, when such failure was not willful, in bad faith or any fault of plaintiff?

2. Does it "make a mockery of the administration of federal appellate justice" to allow a Debtor in Possession under 11 U.S.C. 1107(a) under Order and Control of a Bankruptcy Court, to recover for the benefit of the creditors and the estate, preferential payments made by the debtor?

The parties to this case are:

D. H. OVERMYER CO., INC. (Ohio)
D. H. OVERMYER CO., INC. (Alabama)
D. H. OVERMYER CO., INC. (Arizona)
D. H. OVERMYER CO., INC. OF OHIO
D. H. OVERMYER CO., INC. (California)
D. H. OVERMYER CO., INC. (Colorado)
D. H. OVERMYER CO., INC. (Connecticut)
D. H. OVERMYER CO., INC. (Delaware)
D. H. OVERMYER CO., INC. (Florida)
D. H. OVERMYER CO., INC. (Georgia)
D. H. OVERMYER CO., INC. (Illinois)
D. H. OVERMYER CO., INC. (Indiana)
D. H. OVERMYER CO., INC. (Kansas)
D. H. OVERMYER CO., INC. (Kentucky)
D. H. OVERMYER CO., INC. (Louisiana)
D. H. OVERMYER CO., INC. (Maryland)
D. H. OVERMYER CO., INC. (Michigan)
D. H. OVERMYER CO., INC. (Massachusetts)
D. H. OVERMYER CO., INC. (Minnesota)
D. H. OVERMYER CO., INC. (Mississippi)
D. H. OVERMYER CO., INC. (Missouri)
D. H. OVERMYER CO., INC. (Nebraska)
D. H. OVERMYER CO., INC. (Nevada)
D. H. OVERMYER CO., INC. (New Jersey)
D. H. OVERMYER CO., INC. (New Mexico)
D. H. OVERMYER CO., INC. (New York)
D. H. OVERMYER CO., INC. (North Carolina)
D. H. OVERMYER CO., INC. (Oklahoma)
D. H. OVERMYER CO., INC. (Oregon)
D. H. OVERMYER CO., INC. (Pennsylvania)
D. H. OVERMYER CO., INC. (Rhode Island)
D. H. OVERMYER CO., INC. (Tennessee)
D. H. OVERMYER CO., INC. (Texas)
D. H. OVERMYER CO., INC. (Utah)
D. H. OVERMYER CO., INC. (Virginia)
D. H. OVERMYER CO., INC. (Washington)
D. H. OVERMYER CO., INC. (Wisconsin)
DHORE COMPANY, INC.
OVERMODAL TERMINALS, INC.

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MISCELLANEOUS

I. PRIOR DECISIONS

There have been no published opinions in this case. The Order of Dismissal by the United States District Court in this 200 million dollar matter, Civil Action 75-4735-Mc, was dated at Boston, Massachusetts, January 5, 1982. The appeal to the United States Court of Appeals for the First Circuit, No. 82-1124, was denied by affirmation of the judgment of the district court on December 9, 1982.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The judgment sought to be reviewed was dated and entered December 9, 1982.

2. This court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit in this case by Writ of Certiorari under *28 U.S.C. 1254(1)*.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 11 U.S.C. 1107(a)

§1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitation on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in section 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

STATEMENT OF THE CASE

The action below was brought by Robert P. Herzog, appointed by the Bankruptcy Court in New York as Receiver under Chapter XI of the Federal Bankruptcy Act (hereafter, "the Receiver" or "Herzog") of D. H. Overmyer Co., Inc. (Ohio) and 38 related corporations (hereafter, "DHO Co.") on November 13, 1975, Appendix filed in the First Circuit Court of Appeals (hereafter "A") at Page 6. The complaint below, in the United States District Court for the District of Massachusetts, against the First National Bank of Boston (FNB) is for fraudulent transfer of tens of millions of dollars, causing the bankruptcy of DHO Co. (per amended complaint) (A.281) and constituting preferential payment to FNB in violation of the bankruptcy laws of the United States (A.6), upon which the jurisdiction of the Federal court was based. FNB filed a motion to dismiss (A.26) which, despite pleadings by the plaintiff for a speedy disposition (A.133, 181), was not heard by the court for over four years (A.206,209). The motion was heard on December 12, 1979 and, after delaying the case for four years and causing great financial pressure on the plaintiff (A.344), was summarily denied the very next day (A.209). Finally, more than four years after the complaint was filed, FNB was forced to answer (A.211). FNB denied the basic allegations of the complaint and set forth a relatively minor counterclaim for money loaned to the plaintiff—receiver.

On December 11, 1980 the Receiver was relieved of responsibility for this litigation and was replaced by DHO Co. as Debtor in Possession by Order of the Bankruptcy Court of New York.

On December 12, 1980 plaintiff filed a motion to amend its complaint and to show DHO Co. as the Plaintiff. (A.277, 281). That motion was never decided.

With that motion pending, the court below called a "settlement conference" (A.334). DHO Co. sent its former General Counsel, Edmund M. Connery, Esq., to the conference because he was the most knowledgeable of its attorneys as to

any possibilities of settlement (A.339). The Receiver, lacking any legal interest in the case, sent no one (A.335). The court took exception to the fact that no one authorized to practice in the case had appeared for plaintiff. The *court,* after having taken over four years to hear a motion to dismiss and with a vital undecided motion pending before it for over 12 months, dismissed the case involving 200 million dollars, with prejudice, for *plaintiff's lack of prosecution* on January 5, 1982 (A.335).

The First Circuit Court of Appeals upheld the dismissal for failure to attend the settlement conference and for two other reasons. One—that Herzog waited to file an amended complaint for more than a year after he had been relieved of his responsibilities as receiver; and two—that Herzog abandoned the case, severely undermining any claim that his interests were injured by the dismissal.

This matter comes to this Court after ten years of litigation involving a conglomerate (the Overmyer entities) once valued at over 250 million dollars, now reduced to a minute fraction of that amount due to bankruptcies forced upon several of the Overmyer entities by the respondent through illegal[1] and unethical[2] means. The founder of the conglomerate has been mired in procedural arguments, subjected to irrelevant unsavory personal vilification and has had to prosecute actions designed to protect any remaining assets all with one goal in mind—to obtain a trial on the merits as to the legality of respondent's actions, evidence of which has never been fully presented to a judge or jury.

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[1] Coerced preferential payments in violation of 11 U.S.C. 547 and coerced transfer of assets already pledged to others.

[2] Abuse of fiduciary duty by respondent bank which imposed "a financial advisor" on petitioner, at a charge to petitioner of $100,000.00 per year, and then used that position to further its own interest to the great financial harm of petitioner (A.285-86).

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS WAS BASED ON ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. *The Receiver moved to amend the complaint the very next day after being removed from the case by the Bankruptcy Court of New York, not over a year later as the court erroneously relied upon for its decision.*

The decision of the First Circuit can be seen, *on its face, by its own plain language* to rest on two "facts" both clearly wrong. Included in the Appendix to this Petition is the Order of the Bankruptcy Court of New York removing Herzog and his counsel, Booth, from any further responsibility for this case. This single document, together with the plain language of 11 U.S.C. 1107(a) shows that the decision of the First Circuit was based on two errors.

The essential issue in this case, whether the district court abused its discretion in dismissing the complaint is discussed by the Court of Appeals in its opinion starting at the bottom of Page 6, included in the Appendix to this Petition. From that point until the middle of Page 8 the court discusses the state of the law, and then turns its attention to the record in the instant case.

The court determined that there was no abuse of discretion by the district court in dismissing the complaint. (Opinion p. 8). It based its decision on the failure of an attorney of record to appear at the pre-trial conference. This issue is addressed in Section I. C. below. In addition, the court stated two other reasons for upholding the dismissal. It stated, at p. 8, that Herzog waited for more than a year to move to amend his complaint after he indicated that he had been relieved of his responsibilities as Receiver and that, for all practical purposes he abandoned the case. This second reason is discussed in Section I.B.

The court has misstated the facts. As the record clearly shows, Herzog was relieved of his responsibilities as Receiver

on December 11, 1980, see Appendix to this Petition. The motion to amend the complaint was filed December 12, 1980, the very next day, not over a year later as relied upon by the court in its holding.

Even assuming, *arguendo,* that there had been a delay of over a year from the time the Bankruptcy Court relieved the Receiver of responsibility for this litigation and the time he filed a motion to amend the complaint it is hard to see how that could possibly justify dismissing the case.

This matter involves allegations that the First National Bank of Boston, a major national banking institution, received preferential payments within four months of bankruptcy, contrary to provisions of the Bankruptcy Act. These allegations can be proven merely by showing the dates on which the bank received the payments together with supporting documentation. It is the type of claim that can be answered absolutely, rather than one in which the truth might be obscured. It is therefore unfortunate that this case, involving 200 million dollars, has been mired in procedural problems instead of being decided on the merits.

This case was on the District Court's Docket for a total of six years. During the first four years the court had before it a relatively simple motion to dismiss. That motion languished for four years before being summarily denied one day after oral argument. Subsequently, for one year, the court had before it a motion to amend the complaint. That motion was never decided. For the court, which itself wasted over five years out of the six year "life" of this litigation, to dismiss the complaint while at the same time blaming the plaintiff for delaying the case is outrageous. *That* is a mockery of justice which cries out for this court to exercise its power of supervision.

The second reason, abandonment, is also clearly wrong.

B. *The Receiver's "lack of interest" in the case was the result of his removal by the Bankruptcy Court of New York and, as a matter of law, can not be considered as abandonment or form a basis for dismissal.*

The second reason is equally erroneous. On December 11, 1980 Herzog was relieved of his responsibility for this case by

the Bankruptcy Court in New York. After December 12, 1980, up to and including the district court's call for a settlement conference, Herzog had no legal responsibility for the case and took no further action. That was what counsel freely conceded in his brief and oral argument below. Obviously, once relieved of responsibility, Herzog would have no interest.

But Herzog was still the named plaintiff in the instant litigation.

The Court of Appeals seized upon this lack of legal interest as legal abandonment of the case and therefore a reason to uphold the dismissal. That reason is clearly erroneous. The substitution of parties was ordered by the Bankruptcy Court, and under that Order as well as 11 U.S.C. 1107(a) the Debtor in Possession stands in the shoes of the Receiver in this litigation. Even if a motion should have been filed under Fed. R. Civ. P. 25 however, that could, at all times, have been accomplished upon any suggestion to that effect, but such a requirement can never make Herzog responsible for the instant litigation after he was relieved of that responsibility by the Bankruptcy Court.

C. *The only remaining reason for the dismissal is the failure of an Attorney of Record to appear at the settlement conference.*

The only remaining reason for the dismissal is the failure of an Attorney of Record to comply with a court order to appear at a "settlement conference". A common theme running through most of the cases dealing with dismissal for failure to comply with a court order is the need to determine whether the party dismissed had been prosecuting the case with reasonable diligence.

A review of the procedural history of the instant case shows that there was no failure of diligent prosecution. Plaintiff, Herzog, was a Receiver in Bankruptcy. After the complaint was filed, and the defendant FNB filed a Motion to Dismiss, pleas by Herzog for a prompt decision were futile and no action was taken by the court for over four years. Herzog, as a

Receiver, appointed by the court, was a total stranger to the circumstances of the case. Prosecution of the case was mandated by the information available to him. He needed FNB's Answer to the complaint in order to properly direct the expenditure of scarce funds which he as Receiver had a fiduciary duty to preserve for the benefit of the creditors and the estate. Without the Answer he would have had to expend enormous sums of money (the initial complaint involved tens of millions of dollars; the amended complaint involved 200 million dollars) to pursue issues which eventually might prove to be unnecessary because of admissions contained in the Answer.

If that happened he could very well have been charged personally for wasting assets of the estate. The necessary prudent course was to wait for the answer to be filed.

Subsequent to the filing of the answer, the Bankruptcy Court relieved the Receiver from any responsibility for the case and authorized DHO Co. to pursue it in his place as *Debtors in Possession.* The very next day DHO Co., *in its fiduciary capacity,* filed a motion to amend the complaint and to change the identity of the plaintiff in accordance with the Order of the Bankruptcy Court. With the motion to amend the complaint pending the Debtor in Possession awaited the decision on its motion. That motion was never decided in the remaining year of the case.

It is evident from the above that neither the Receiver nor subsequently the Debtor in Possession were in any position to prosecute the case during five of the six years of its pendency. Therefore it cannot be said that dismissal could properly be based on any failure of diligent prosecution.

D. *The Court of Appeals may have erroneously based its decision on its belief that allowing DHO Co., as Debtor in Possession, to become the plaintiff would "make a mockery of . . . appellate justice."*

In its Opinion at p. 6, the Court of Appeals pointed out that Overmyer and DHO Co. were charged by Herzog as co-conspirators in the original complaint. Then the court said:

"to grant Overmyer and D.H. Overmyer Co. standing to appeal from a judgment dismissing a complaint that characterized them as co-conspirators would make a mockery of the administration of federal appellate justice. We decline to do so."

This statement shows that the Court of Appeals believed that there was something wrong with allowing DHO Co. as Debtors in Possession to object to the dismissal of the complaint when that complaint charged DHO Co. itself with wrongdoing; namely being a co-conspirator with the defendant to pay money to defendant that rightfully belonged to other creditors of DHO Co. What the Court of Appeals overlooked was that DHO Co., only acted in this litigation as *Debtors in Possession.* In that capacity it was not the same entity as the one charged with being a co-conspirator and any recovery it obtained in the case would have gone to the same parties that would have received it if Herzog were still the named plaintiff. Specifically, any recovery would have been subject to the control of the Bankruptcy Court and would enure to the benefit of the creditors *in exactly the same manner as it would have if the Receiver were still prosecuting the case.* The Court of Appeals' misunderstanding of this distinction, to the extent that it formed a basis for the court's refusal to reverse the dismissal by the district court, constituted a serious error of law. As Debtor in Possession, DHO Co.'s responsibility is controlled by the Bankruptcy law, 11 U.S.C. 1107(a), which provides that a Debtor in Possession "shall have all the rights, . . . and shall perform all the functions and duties . . . of a trustee (or under prior act, Receiver) serving in a case under this chapter."

"This section places a debtor in possession in the shoes of a trustee in every way." Reports of the Judiciary Committees of the United States House of Representatives and the United States Senate. H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 404. S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 116. Indeed, "the court's willingness to leave the Debtor in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the

fiduciary responsibilities of a trustee. And if they default in this respect, the court may at any time replace them with an appointed trustee." *Wolf v. Weinstein,* 372 U.S. 633 at 651 (1963). The First Circuit completely misunderstood the rights and responsibilities of a Debtor in Possession.

Further, the basis for the claims in the original complaint was the same as the basis for the claims made in the amended complaint. The basis for the original claims was preferential payments and transfer of assets (already pledged to others) by DHO Co. as co-conspirators to defendant FNB. The amended complaint did not change the claim of preferential payments or transfer of assets; it changed the claim that DHO Co. was a co-conspirator and charged instead that DHO Co. acquiesced under improper coercion by FNB.

DHO Co. as "trustee" had an obligation to correct the false claim that it had conspired with defendant to make preferential payments and transfers.

But even if it had, while acting in its "mere" *corporate* capacity prior to bankruptcy, conspired to make preferential payments, it still had the right and duty, acting in its *trustee* capacity as Debtor in Possession, to litigate for the return of those assets. *Gochenour v. Cleveland Terminals Bldgs. Co.,* 118 F.2d 89(6th Cir. 1941), *H.H. Sacks, Inc. v. Atherton,* 108 F.2d 173 (1st Cir. 1939), *Pocono Racing Management Ass'n v. Banks,* 434 F.Supp. 507 (D.C. PA. 1977), *Mack v. Bank of Lansing,* 396 F.Supp. 935 (D.C. Mich. 1975), *Texas Consumer Finance Corp. v. First National City Bank,* 365 F.Supp. 427 (D.C. N.Y. 1973).

Further error is evidenced by the court's statement in its opinion at p. 9 that "Herzog's lack of interest in the action mitigates any possible injury to him due to the dismissal of the complaint". This statement indicates the failure of the court to recognize that Herzog was a Receiver and therefore was acting not on his own behalf, but as a fiduciary, and officer of the court, on behalf of the creditors and the estate. So too, it failed to recognize that the Debtor in Possession was acting not on its own behalf as a debtor, but as a fiduciary and officer of the

court on behalf of the creditors and the estate. *New York v. Rassner,* 127 F.2d 703 (2d Cir. 1942). There was an identity of responsibility which the First Circuit never understood.

The court confused the identity of the plaintiff, i.e., whether Herzog was plaintiff or whether DHO Co. as Debtor in Possession was plaintiff, with its apparent belief that any proceeds from the case would go to that named plaintiff. In fact, no matter which was the named plaintiff, any proceeds would have been for the benefit of the creditors and the estate under the supervision of the Bankruptcy Court of New York. Herzog and DHO Co. were both in the position of "Trustees" for the benefit of the creditors. Obviously, the mere change of "Trustees" ordered by the Bankruptcy Court of New York could not change the beneficiaries' legal interest in the outcome of the case.

The failure of the Court of Appeals to understand the continuity of interest of the *cestui que trust,* is responsible for its erroneous statement that Herzog's abandonment of the case "severely undermines any claim that Herzog's interests were injured by the dismissal." Opinion at 8-9. The only interest Herzog ever had was on behalf of the *cestui que trust* and that interest was severely injured by the dismissal. As a matter of law, the mere change of "Trustees" cannot support the court's statement.

II. THE FIRST CIRCUIT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

This Court held that constitutional limitations prohibit dismissal of a case for failure to obey a court order where such failure is not willful, in bad faith or any fault of the party. *Societe International v. Rodgers,* 357 U.S. 197 (1958). There, Harlan, J. stated that the power of the court to dismiss an action must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. *Societe Internationale,* 357 U.S. at 209.

In the instant case the court, *sua sponte,* ordered the parties to attend what it described as a "settlement conference". Plaintiff, Herzog, had been relieved of any responsibility for the

case by the Bankruptcy court, but that fact had not been recognized by the district court below. The only two counsel of record were Edgar H. Booth who, along with the Receiver, was relieved of all responsibility for this case by the Bankruptcy Court, and Morton S. Robson who represented DHO Co. who was not a recognized party to the case. It is therefore clear that both counsel to whom the court sent notices to attend the "settlement conference" had no capacity to settle anything. DHO Co., however, out of respect for the court, sent its former General Counsel, New York attorney Edmund M. Connery, to the conference. But the court did not allow Mr. Connery to appear for plaintiff. Instead it dismissed the case, despite plaintiff's best efforts to comply with the court's order. Under these circumstances it is untrue to claim that plaintiff's failure was willful, in bad faith or due to its fault. That is the standard set by this court in *Societe Internationale.* The Court of Appeals trampled that standard, by the mere unsupportable comment that "there was a conspicuous absence of the good faith efforts to comply with the court's requests that were evident in *Societe Internationale.* Opinion at 7, N.3. For the reasons stated above, the good faith efforts of plaintiff are obvious and its dilemma as to who should appear makes it clear that its confusion as to what to do can in no way be called willful, in bad faith or its fault. There being no other reason for the dismissal below, petitioner urges this court to recognize that the Court of Appeals decided this case contrary to this Court's holding in *Societe Internationale.*

III. THIS DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS.

In addition, the United States Court of Appeals for the First Circuit has consistently upheld the dismissal of cases for failure to comply with pre-trial conference requirements, rather than less severe sanctions, contrary to the other circuits.

While the First Circuit held that in the instant case the district court may properly dismiss a claim for failure to appear at a pretrial conference, the Fifth Circuit has held just the

opposite, that dismissal for failure to attend a pre-trial conference amounted to an abuse of the trial court's discretion. *Graves v. Kaiser Aluminum & Chemical Co., et al.*, 528 F.2d 1360 (5th Cir. 1976); *E. F. Hutton & Co., v. Moffatt*, 460 F.2d 284 (5th Cir. 1972) (default judgment for failure to attend pre-trial conference was abuse of discretion); *Flaska v. Little River Marine Construction Co., Inc.*, 389 F.2d 885 (5th Cir. 1968) (even where there was dereliction and failure at every stage of proceeding from the time the issue was joined, dismissal was held to be too drastic a sanction); the District of Columbia Circuit has been unwilling to allow a dismissal because of the failure of counsel to attend a pre-trial conference, *Zaroff v. Holmes*, 379 F.2d 875 (D.C. Cir. 1967); the Tenth Circuit held that failure to appear at a pre-trial conference was insufficient grounds to justify a dismissal, *Meeker v. Rizley*, 324 F.2d 269 (10th Cir. 1963); the Third Circuit held that lack of prosecution did not justify a default judgment and thereby reversed for a trial on the merits, *Tozar v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3rd Cir. 1951).

The decisions of the first Circuit are not in conformity with the other circuits cited above. The First Circuit favors dismissal for failure to appear at pre-trial conferences *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981), even where, as here, the case involves 200 million dollars.

CONCLUSION

The Court of Appeals decided this case on two erroneous grounds. It held that dismissal for failure to attend a "settlement conference" was proper because the Receiver waited for more than a year to move to amend his complaint after he indicated that he had been relieved of his responsibilities as Receiver; and that the Receiver's interests could not be injured by the dismissal. Both reasons, shown to be clearly erroneous, fail to support the court's decision.

In addition, the Court of Appeals appears to have reached its decision partially as a result of its erroneous belief that DHO

Co. the debtor, must not be allowed to stand in the shoes of a plaintiff who had charged DHO Co. with being a co-conspirator with the defendant. The Court of Appeals thereby confused the debtor with the debtor's capacity as *Debtor in Possession.* 11 U.S.C. 1107(a) and the Bankruptcy Court of New York specifically put the Debtor in Possession in the shoes of the Receiver. And it is settled law that such a Debtor in Possession can pursue claims to recover preferential payments made by itself in its capacity as debtor.

The Court of Appeals' decision was influenced by its total misunderstanding of the dual capacity of DHO Co.

Further, absent the erroneous reasons cited above, the First Circuit's decision goes contrary to the guidelines set forth by this Court in *Societe Internationale v. Rodgers,* 357 U.S. 197 (1958).

Finally, the First Circuit consistently has upheld the dismissal of cases for failure to comply with pre-trial conference requirements, contrary to the course followed by the other circuits which order less severe sanctions.

In view of the above, both the facts and law have been erroneously interpreted in this case by the First Circuit Court of Appeals which has so far departed from the accepted and usual course of judicial proceedings, *and* has so far sanctioned such a departure by the district court, as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 82-1124

ROBERT P. HERZOG,
Receiver Of D.H. OVERMYER CO., INC.
(OHIO), Et Al.,

Plaintiffs, Appellants,

v.

THE FIRST NATIONAL BANK OF BOSTON,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. District Judge]

Before

Coffin, Chief Judge,

Timbers, Senior Circuit Judge,*

and Campbell, Circuit Judge.

Norman Jackman, with whom Comras & Jackman was on brief, for appellants.

William S. Eggeling, with whom Ropes & Gray was on brief, for appellee.

December 9, 1982

* Of the Second Circuit, by designation.

TIMBERS, Circuit Judge: This is an appeal from a judgment entered in the United States District Court for the District of Massachusetts dismissing the complaint with prejudice for lack of prosecution over a period of six years. The essential issue on appeal is whether the court abused its discretion in dismissing the complaint when appellant failed to send an appropriate representative to a pre-trial settlement conference after prior dilatory conduct by appellant. We hold, for the reasons set forth below, that the court did not abuse its discretion in dismissing the complaint. We affirm.

I.

The action was commenced by Robert P. Herzog ("Herzog") in November 1975 in his capacity as receiver of thirty-nine companies ("debtors") owned or controlled by Daniel H. Overmyer ("Overmyer"). Herzog had been appointed receiver under Chapter XI of the Bankruptcy Act of 1898, 11 U.S.C. §§ 2a(3), (5) (1976).[1]

In his original complaint, Herzog alleged that Overmyer and The First National Bank of Boston ("FNBB") conspired to siphon off funds of the debtors to the detriment of creditors. FNBB, however, was named as the sole defendant. Herzog alleged that the debtors' corporate formalities were disregarded and that all of the companies were operated as a single entity by Overmyer and D.H. Overmyer Co., Inc., the latter operating warehouses throughout the United States.

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1. Since this action was commenced under the former Bankruptcy Act, we are required under the savings provisions of the Bankruptcy Act of 1978 to apply the former Bankruptcy Act on this appeal. Bankruptcy Act of 1978, Pub. L. No. 95-598, § 403, 92 Stat. 2683.

The complaint alleged that the co-conspirators arranged to have the debtors improperly transfer to FNBB "substantially all of their revenue generating property and assets", despite the fact that this property previously had been assigned to third parties as security for liabilities of several of Overmyer's debtor corporations. The alleged conspiracy, according to the complaint, continued into the four month voidable preference period prior to the filing of Chapter XI petitions by Overmyer's companies. The complaint also alleged that within a year of the filing of the Chapter XI petitions certain property was transferred to FNBB in violation of § 67d of the Bankruptcy Act. The complaint further alleged that one of Overmyer's companies, Overmyer Distribution Services, transferred certain of the debtors' assets to FNBB although it lacked the authority to do so.

Herzog's standing to commence the action clearly was within the scope of his authority as receiver of Overmyer's thirty-nine companies. As receiver, Herzog was under a fiduciary duty to protect the assets of the debtor. In re C.M. Piece Dyeing Co., Inc., 89 F.2d 37, 40 (2nd Cir. 1937) ("[A] receiver is a fiduciary[;] he undertakes to care for the property and manage it for the creditors, to act with assiduity and with reasonable competence."); Collier on Bankruptcy ¶ 201.15 (14th Ed. 1978). Regardless of the merits of the action, its commencement was consonant with Herzog's duties as receiver. As the pre-trial proceedings progressed, however, certain events began to undermine Herzog's motive in pursuing the action.

In October 1979, Herzog stated that he had been relieved of all responsibilities as receiver and that the debtors had regained possession. Although Herzog had not yet been formally discharged, a custodial receiver was appointed. In November 1979, Herzog's attorney withdrew his appearance and stated that the debtors' attorneys "are in control of [this litigation]."

In December 1980, five years after commencement of the action, Herzog moved to amend the complaint. By this time he had been discharged as receiver. In his proposed amended complaint, Herzog sought to substitute Overmyer and his thirty-nine companies as plaintiffs in the action.[2] This was a sharp turnabout, since Overmyer had been portrayed disparagingly as a co-conspirator in the original complaint. Furthermore, the proposed amended complaint totally abandoned the legal theories of the original complaint and alleged that Overmyer's companies had been victimized by FNBB and thrown into Chapter XI proceedings as a result of FNBB's alleged stranglehold on Overmyer and his companies. As might be expected, FNBB opposed the motion to amend the complaint. It argued inter alia that Herzog had flouted the governing rules by not applying to the court to change the plaintiff in the action pursuant to Fed. R. Civ. P. 25, and that the

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2. Herzog had obtained an order from Bankruptcy Judge Joel Lewittes of the Southern District of New York permitting the debtors to prosecute the instant action. Herzog asserts that the Southern District Bankruptcy Court order per se established debtors' standing to bring this appeal. Even if Herzog were correct as to the debtors' standing, Overmyer (one of the substituted plaintiffs in the amended complaint) was not covered by Judge Lewittes' order. In any event, it appears that the Massachusetts District Court would have had to approve the substitution of parties pursuant to Fed. R. Civ. P. 25(a).

proposed amended complaint was based on theories "contradictory to those presented in the [original] pleadings." (emphasis in original). In short, FNBB argued that the proposed amended complaint sought to commence a separate and distinct action. The court, however, dismissed the original complaint without ruling on the motion to amend the complaint. The instant appeal is from the judgment dismissing the original complaint.

Backing up for a moment, the court on October 15, 1981 had ordered both parties to appear at a pre-trial settlement conference on January 5, 1982. Counsel were directed to bring with them written suggestions of compromise. On the day of the conference, neither Herzog nor his two current counsel of record appeared. Instead, a New York lawyer who had not appeared previously in the case was sent to represent plaintiff's interests. Moreover, plaintiff's counsel failed to submit a written suggestion of compromise.

The court thereupon terminated six years of dilatory conduct by plaintiff, holding that the complaint should be dismissed for lack of prosecution with prejudice and costs. This appeal followed. We affirm.

II.

FNBB argues that this appeal is actually being brought by Overmyer & D.H. Overmyer, Inc., and that they lack standing. Although Overmyer and D.H. Overmyer Co., Inc. appear to have been managing this action since Herzog abandoned it, we are satisfied, in view of the unique history of the case, that Herzog alone has standing to appeal from the judgment dismissing the original complaint. That complaint alleged serious claims against Overmyer. Dismissal of that complaint

did not prejudice Overmyer's interests; nor did the dismissal by some strange alchemy infuse in him standing as an aggrieved party to appeal from the judgment.

Generally, only a party to the action below has standing to appeal. United States ex rel. Louisiana v. Jack, 244 U.S. 397, 402 (1917). Overmyer and D.H. Overmyer Co., Inc., however, arguably might have standing to appeal from the judgment dismissing the complaint if they were truly aggrieved by the judgment and if they had been denied a meaningful opportunity to intervene in the original action. 9 Moore's Federal Practice ¶ 203.06 (2d ed. 1982); S.E.C. v. An-Car Oil Co., Inc., 604 F.2d 114, 119 (1st Cir. 1979) (standing recognized where district court did not act on two motions to intervene, although "[o]rdinarily, only a person who was a party to the proceeding below and who is aggrieved by the judgment or order is entitled to appeal"). In the instant case, however, Overmyer and D.H. Overmyer Co. were charged by Herzog as co-conspirators in the original complaint. It would have been anomalous for Overmyer and D.H. Overmyer Co. to be permitted to intervene on the plaintiff's side against FNBB in the original action. Now to grant Overmyer and D.H. Overmyer Co. standing to appeal from a judgment dismissing a complaint that characterized them as co-conspirators would make a mockery of the administration of federal appellate justice. We decline to do so.

Herzog, however, is the named party to this appeal and the party who will be bound by the district court's judgment. Accordingly, we hold that Herzog has standing as an appellant.

III.

This brings us to the essential issue on this appeal — whether the court abused its discretion in dismissing the complaint.

We recognize, of course, that dismissal with prejudice for lack of prosecution without reaching the merits is a harsh result. Our legal system favors adjudication of cases on the merits. Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971). The federal rules of civil procedure make every effort to provide for correction of pleading mistakes. At the same time, however, congested court calendars and dilatory tactics by litigants make it necessary for trial judges to exercise a firm hand in seeing to it that cases are efficiently managed and that lawyers do not abuse the liberal rules of civil procedure. Link v. Wabash Railroad Co., 370 U.S. 626, 629-30 (1962) ("The power to invoke this sanction [dismissal of the action] is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.").

The Court in Link observed that the power of a court under Fed. R. Civ. P. 41(b) to dismiss an action sua sponte for lack of prosecution is an inherent power of a court, enabling it to "manage [its] own affairs...." Link, supra, 370 U.S. at 630. Thus, the Court in Link sanctioned a deferential standard — abuse of discretion — as the standard for reviewing dispositions of this kind. Id. at 633.3/

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3. Appellant argues that the instant case is controlled by Societe Internationale v. Rogers, 357 U.S. 197 (1958). We disagree. Although Societe Internationale and the instant case both involved pre-trial dismissals, they are distinguishable. In Societe Internationale a plaintiff was trapped between conflicting requirements of Swiss law and an order to produce documents in a United States district court. In the instant case there were no such conflicting obligations on the part of the Overmyer "plaintiffs", even if they were to be granted standing to appeal. Furthermore, in the instant case there was a conspicuous absence of the good faith efforts to comply with the court's requests that were evident in Societe Internationale.

Accord National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) ("The question ... is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.").

Our court has recognized that, although dismissal with prejudice is a harsh remedy, Pease v. Peters, 550 F.2d 698, 700 (1st Cir. 1977); Richman v. General Motors Corp., supra, appellate review of sanctions of this nature are governed by a discretionary standard. Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977); Affanato v. Merrill Brothers & Cianbro Corp., 547 F.2d 138, 140 (1st Cir. 1977); Eisler v. Stritzler, 535 F.2d 148, 153 (1st Cir. 1976); Local Union No. 251 v. Town Line Sand & Gravel, Inc. 511 F.2d 1198, 1199 (1st Cir. 1975). See generally 9 Wright & Miller, Federal Practice and Procedure § 2370, at 199. (1971 & Supp. 1982).

The record in the instant case strikes us as fully supporting the court's exercise of sound discretion in dismissing the complaint with prejudice. Aside from not sending an attorney of record to the pre-trial conference (although he received notice of the conference two and one half months before the scheduled date), Herzog waited for more than a year to move to amend his complaint after he indicated that he had been relieved of his responsibilities as receiver. Furthermore, the court was confronted with a peculiar situation when the individual who had commenced the action in 1975 — Herzog -- for all practical purposes abandoned the case. This last fact, which was freely conceded by appellant's counsel on the instant appeal, severely undermines any

claim that Herzog's interests were injured by the dismissal. In balancing the discretion accorded a trial court in managing its calendar with the policy that cases should be determined on their merits, the fact that Herzog in effect had removed himself from this litigation lends support to the court's decision to terminate the litigation after Herzog's counsel failed to appear at the pre-trial conference. Herzog's lack of interest in the action mitigates any possible injury to him due to the dismissal of the complaint. Corchado v. Puerto Rico Maine Management, Inc., 665 F.2d 410, 413 (1st Cir. 1981) ("district court's discretion to use the extreme sanction of dismissal for failure ... to appear at scheduled conferences or hearings will be upheld unless abused"); Medeiros v. United States, 621 F.2d 468, 470 (1st Cir. 1980)(procedural history of each case must be examined); Luis C. Forteza e Hijos, Inc. v. Mills, 534 F.2d 415, 417, 419 (1st Cir. 1976) (nonlocal attorney appeared at pre-trial settlement conference).

We hold that the court's dismissal with prejudice was not an abuse of discretion.

IV.

The parties to this appeal have briefed the question of the impact of a recent bankruptcy court decision in the Northern District of Ohio on the instant case. That decision, Hadar Leasing International Co., Inc., et al. v. D.H. Overmyer Telecasting Co., Inc., et al., No. B81-00506 (N.D. Ohio Sept. 17, 1982), involved numerous issues concerning Overmyer and FNBB that appellant here argues are "the same issues as in the instant litigation." Since our decision on the instant appeal deals solely with the propriety of the dismissal of the instant

complaint for lack of prosecution, we find it neither necessary nor appropriate to reach any question with respect to the impact of the Ohio bankruptcy decision upon the instant case.

Affirmed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 82-1124.

ROBERT P. HERZOG, RECEIVER
OF D.H. OVERMYER CO., INC., (OHIO), ET AL.,
Plaintiffs, Appellants,

v.

THE FIRST NATIONAL BANK OF BOSTON,
Defendant, Appellee.

JUDGMENT

Entered December 9, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP

Clerk.

(cc: Messrs. Jackman and Eggeling.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT P. HERZOG, Receiver of
D.H. OVERMYER CO., INC. (Ohio) et al

v. Civil Action 75-4735-Mc

THE FIRST NATIONAL BANK OF BOSTON

ORDER OF DISMISSAL

McNAUGHT, District Judge

This matter having been called before the Court for "Settlement Conference" and trial counsel or a person with authority to compromise was to appear with a written "Suggestion of Compromise".

At the call a New York attorney appeared and conceded that counsel of record received notice of said conference.

Plaintiff having failed to appear at "Settlement Conference" and failing to file a written "Suggestion of Compromise" after due notice,and no one authorized to practice in the case having appeared for plaintiff

It is ORDERED that the complaint, be and hereby is, dismissed for lack of prosecution with prejudice and costs.

By the Court,

Karl W. Fagan

Karl W. Fagan
Deputy Clerk

Dated at Boston this 5th
day of January 1982

S E A L

In The Matter Of:	In Proceedings For Arrangement No. 73 B 1129
D.H. OVERMYER CO., INC. (OHIO), et al.,	STIPULATION AND ORDER
Consolidated Debtors.	

WHEREAS, there is presently pending in the United States District Court for the District of Massachusetts an action entitled Robert P. Herzog, Receiver of D.H. Overmyer Co., Inc., Plaintiff v. The First National Bank of Boston, Defendant, Civil Action No. 75-4735-MC (hereinafter the "Boston Action"); and,

WHEREAS, Robert P. Herzog, the Receiver (the "Receiver") herein, and the Consolidated Debtors are desirous of substituting the Consolidated Debtors as Plaintiffs in the Boston Action in place and stead of the Receiver;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the Receiver and the Consolidated Debtors as follows:

1. The Consolidated Debtors be, and they hereby are, authorized and empowered to prosecute the Boston Action in place, and instead, of the Receiver; relieving the Receiver and his counsel of further responsibility for the Boston Action.

2. The Receiver and the Consolidated Debtors be, and they hereby are, authorized and directed to execute and deliver

... to take such actions as may be necessary to carry out and effectuate the substitution of the Consolidated Debtors as Plaintiffs in the Boston Action in place and instead of the Receiver.

3. The Receiver and his counsel, be and they hereby are, relieved of any further responsibility and duties in the Boston Action except as regards carrying out the terms and conditions of this Stipulation and Order.

Dated: December 11, 1980
New York, New York

BOOTH, LIPTON & LIPTON
Attorneys for the Receiver

By: _____
A Member of the Firm
405 Park Avenue
New York, New York

ROBSON & MILLER
Attorneys for the
Consolidated Debtors

By: _____
A Member of the Firm
950 Third Avenue
New York, New York

SO ORDERED: 12/11/80

_____
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 80-1020-MC

ROBERT P. HERZOG, Receiver ET, AL,
Plaintiffs,

v.

THE FIRST NATIONAL BANK OF BOSTON,
Defendant.

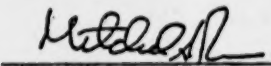
PLAINTIFFS' MOTION TO AMEND COMPLAINT

Plaintiff, Robert P. Herzog, Receiver, moves, pursuant to Fed. R. Civ. P., Rule 15, to amend the Complaint in the form attached hereto. As reasons therefor, Plaintiff states the following:

1. Robert P. Herzog, Receiver has been discharged and replaced by the debtor in possession. A copy of the "Stipulation and Order" of the United States Bankruptcy Court, Southern District of New York is attached hereto and labelled "A".
2. The amended complaint arises from the same underlying facts as the original complaint. The amended complaint restates more precisely the claims for relief appropriate to the action.
3. No substantial discovery has been commenced thus far.
4. The Bank has successfully resisted all claims for relief by Plaintiffs in the amended complaint in actions filed in

other jurisdictions based upon the fact that these matters should be litigated in this court.

ROBERT P. HERZOG, Receiver, ET AL
By their attorneys,



Mitchel S. Ross
BERNKOPF, GOODMAN & BASEMAN
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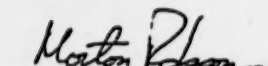

Morton Robson
ROBSON & MILLER
950 Third Avenue
New York, New York
(212) 832-2310

DATED: December 12, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1487

ROBERT P. HERZOG, RECEIVER
Petitioner,

v.

THE FIRST NATIONAL BANK OF BOSTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

WILLIAM S. EGGELING
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Counsel for Respondent

April 1, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1487

ROBERT P. HERZOG, RECEIVER

Petitioner,

v.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

The Court of Appeals for the First Circuit applied the correct legal standard — abuse of discretion — to review the decision of the district court. This standard of review has been expressly commanded by this Court. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). There is thus no conflict between the only legal issue presented by the decision of the First Circuit and any decision of this Court. *See also Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099, 2106-07 (1982) (disposing of petitioner's claim of a

conflict with *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958)). Further, there is no conflict between the decision of the First Circuit and that of any other Court of Appeals. *See, e.g., In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 823 (CA 3 1982); *Marshall* v. *Segona*, 621 F.2d 763, 766-67 (CA 5 1980); *Brown* v. *McCormick*, 608 F.2d 410, 414 (CA 10 1979); *Dellums* v. *Powell*, 566 F.2d 231, 235 (CA DC 1977). Petitioner's asserted conflicts with the law of these Circuits reflect no more than differing factual assessments in different cases. All, moreover, were decided prior to *National Hockey League*.

The Court of Appeals correctly applied the abuse of discretion standard to the facts in the record on appeal. Petitioner distorts selected parts of the opinion below in an attempt to suggest the appearance of confusion in the *ratio decidendi*. No such confusion exists, however, as perusal of the First Circuit's complete opinion will demonstrate. All petitioner's contentions are in any event entirely fact-specific. They thus present no issues appropriate for the exercise of this Court's certiorari power.*

There is an additional reason why issuance of the writ should not be contemplated here. Contrary to the assertion at p. 3 of the petition, the claims of "the Overmyer entities" have been *fully* presented in a trial. That trial, which took over seven weeks, resulted in a 116 page decision in favor of the respondent! *Hadar Leasing International Co.* v. *D. H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co., Inc.)*, 23 B.R. 823 (Bankr.

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*Because the petition is facially frivolous, we have not addressed the numerous errors contained therein. For example, all the statutory cites and the argument thesis advanced at pp. 7-10, are simply inapposite. The D.H. Overmyer Co., Inc. (Ohio), Chapter XI bankruptcy proceedings were commenced in 1973, and are therefore governed by the provisions of the Federal Bankruptcy Act, not the 1978 Bankruptcy Code cited by petitioner. *See* Pub. L. No. 95-598, § 403(a), 92 Stat. 2549, 2683 (1978).

N.D. Ohio 1982). That decision has thus completely vitiated the claims which petitioner asserts remain unresolved, and has effectively mooted the sole reason advanced by petitioner for seeking further review in this Court.

The petition should be denied.

Respectfully submitted,

WILLIAM S. EGGELING
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Boston, MA 02110
(617) 423-6100
Counsel for Respondent

April 1, 1983

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No. 82-1487

IN THE

Supreme Court of the United States

Spring Term 1983

ROBERT P. HERZOG, RECEIVER OF
D. H. OVERMYER CO., INC. (OHIO) *ET AL., Petitioner*

v.

THE FIRST NATIONAL BANK OF BOSTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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April 11, 1983

No. 82-1487

IN THE

Supreme Court of the United States

Spring Term 1983

ROBERT P. HERZOG, RECEIVER OF
D. H. OVERMYER CO., INC. (OHIO) *ET AL., Petitioner*

v.

THE FIRST NATIONAL BANK OF BOSTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

Respondent's Memorandum Opposing Certiorari raised an issue not raised in the Petition for Certiorari. Respondent claims, at the bottom of page 2 of its Memorandum, that "[t]here is an additional reason why issuance of the writ should not be contemplated here." Respondent then asserts that "the claims of 'the Overmyer entities' have been *fully* presented in a trial", in Ohio, which has "effectively mooted the sole reason advanced . . ." in this case. Petitioner argued the exact opposite in the Court of Appeals and both parties briefed the issue. That court did not reach the issue, stating, in its opinion at page 10, that it is "neither necessary nor appropriate to reach any question with respect to the impact of the Ohio bankruptcy decision. . . . "

The issue of the Ohio decision is therefore not before this court.

As to the sardonic footnoted comments of Respondent in its Memorandum at page 2, regarding the applicability of the Federal Bankruptcy Act or the 1978 Bankruptcy Code to the responsibilities of a Debtor in Possession, this is a distinction without a difference. The Federal Bankruptcy Act provision, 11 U.S.C. 742, stated:

> Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

Both the old and new sections place the Debtor in Possession in the shoes of a trustee, subject to control of the court. That is the point made in the Petition for Certiorari.

Respectfully submitted,

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